



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 211104-0226]

RIN 0648-BK70

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Resources of the Gulf of Mexico; Requirement for a Descending Device or Venting Tool

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to clarify terms used in the Direct Enhancement of Snapper Conservation and the Economy through Novel Devices Act of 2020 (Descend Act). Section 3 of the Descend Act requires commercial and recreational fishermen to have a descending device or a venting tool on the vessel and ready for use when fishing for federally managed reef fish species in Gulf of Mexico (Gulf) Federal waters. The purpose of this proposed rule is to clarify the statutory definitions of descending device and venting tool.

DATES: Written comments on the proposed rule must be received by *[insert date 30 days after date of publication in the Federal Register]*.

ADDRESSES: You may submit comments on the proposed rule, identified by "NOAA-NMFS-2021-0100," by either of the following methods:

- *Electronic submission:* Submit all electronic comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov> and enter "NOAA-NMFS-2021-0100" in the Search box. Click the "Comment" icon, complete the required fields, and enter or attach your comments.

- *Mail:* Submit all written comments to Peter Hood, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments - enter "N/A" in required fields if you wish to remain anonymous.

Electronic copies of the Descend Act and the Regulatory Flexibility Act (RFA) analysis for this proposed rule may be obtained from www.regulations.gov or the NMFS

Southeast Regional Office website at
<https://www.fisheries.noaa.gov/action/descending-device-and-venting-tool-direct-enhancement-snapper-conservation-and-economy>.

FOR FURTHER INFORMATION CONTACT: Peter Hood, NMFS Southeast Regional Office, telephone: 727-824-5305, or email: peter.hood@noaa.gov.

SUPPLEMENTARY INFORMATION: On January 13, 2021, the majority of the Descend Act became effective with the exception of section 3, which becomes effective on January 13, 2022. Section 3 of the Descend Act amends the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by adding section 321, titled "Required possession of descending devices." Section 321 of the Magnuson-Stevens Act requires fishermen on commercial vessels, charter vessels and headboats (for-hire vessels), and private recreational vessels to have a descending device or venting tool rigged and ready to use when fishing for Gulf reef fish in Federal waters. This proposed rule would clarify the statutory definitions of descending device and venting tool, which are devices designed to help reduce post-release mortality of fish from the effects of barotrauma.

Gulf reef fish are those fish included in the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). A list of Gulf reef fish can be found in

Table 3 of Appendix A to 50 CFR part 622 - Species Tables; Gulf Reef Fish, <https://www.ecfr.gov/current/title-50/chapter-VI/part-622/appendix-Appendix%20A%20to%20Part%20622>. For purposes of management of under the FMP, Federal waters in the Gulf begin seaward of 9 nautical miles (16.7 km) from the coast off all the Gulf States (Pub. L. 114-113, December 18, 2015, and Pub. L. 115-31, May 5, 2017).

Barotrauma in fish is an injury caused by the expansion of gas inside a fish from the rapid pressure decrease that may occur when a fish is retrieved from depth. Barotrauma generally occurs when retrieving fish from depths of 90 ft (27.4 m) or greater, though it can occur in waters as shallow as approximately 33 ft (10 m) deep. The internal gases fill the abdomen and the fish may be unable to swim back down to the catch depth. Signs of barotrauma in fish include a distended abdomen, bulging eyes, an everted stomach, and bubbling under the scales. Fish experiencing barotrauma often have difficulty returning to deeper water or float on the surface, which makes them more vulnerable to predation from dolphins, sharks and other fish, and seabirds. Fishermen can help reduce mortality to fish they release by using a descending device or a venting tool when barotrauma is affecting a fish that has been caught. A descending device lowers the fish back to depth where internal gases recompress and the

fish can be released. A venting tool can release gases in a fish's abdomen at the surface allowing the fish to swim unaided back to depth.

The Descend Act states that the term "venting tool" has the meaning given to it by the Gulf Council. The Gulf Council defines the term venting tool in its Policy on the Use of Venting Tools and Descending Devices as a sharpened, hollow instrument capable of penetrating the abdomen of a fish to release the excess gases accumulated in body cavity. The definition also indicates a device that is not hollow, such as a knife or ice pick, is not a venting tool and will cause additional damage to a fish.

The Gulf Council previously required the use of a venting tool for Gulf reef fish in Amendment 27 to the FMP and the final rule implementing the amendment added a definition of "venting device" to the regulations (73 FR 5117, January 29, 2008). The term "venting device" means, "a device intended to deflate the abdominal cavity of a fish to release the fish with minimum damage." 50 CFR 622.2. The Gulf Council and NMFS subsequently removed the requirement to use a "venting tool," the term used in the August 2, 2013, final rule, for several reasons (78 FR 46820), but the regulations at 50 CFR 622.2 retain the definition of venting device. This proposed rule would clarify that the applicable Gulf Council definition is the

definition in its Policy on the Use of Venting Tools and Descending Devices.

The Descend Act defines the term descending device as an instrument that will release fish at a depth sufficient for the fish to be able to recover from the effects of barotrauma; it is a weighted hook, lip clamp, or box that will hold the fish while it is lowered to depth, or another device determined to be appropriate by the Secretary of Commerce (Secretary); and is capable of releasing the fish automatically, releasing the fish by actions of the operator of the device, or allowing the fish to escape on its own. This proposed rule would clarify that the depth sufficient for a fish to be able to recover from the effects of barotrauma is the depth at which the fish was caught and specify the minimum weight and minimum length of line required to be consistent with the current regulatory definition of "descending device" at 50 CFR 622.188(a)(4). The regulations in section 622.188(a)(4) were put in place by NMFS in 2020 to implement the South Atlantic Fishery Management Council's Regulatory Amendment 29 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic (85 FR 36166, June 15, 2020). Those regulations require a descending device be on board a vessel and be ready for use while fishing for or possessing South Atlantic snapper-grouper.

Management Measures Contained in this Proposed Rule

Consistent with the requirement in the Descend Act, this proposed rule would require a descending device or a venting tool on the vessel that is rigged and ready for use while fishing is occurring. This proposed rule would also clarify the statutory definitions of descending device and venting tool to assist Gulf reef fish fishermen in complying with the statutory requirement.

Descending Device

This proposed rule would define a descending device as a device capable of releasing the fish at the depth from which the fish was caught, and would specify that the device must use a minimum of a 16-ounce (454-gram) weight and a minimum of a 60-ft (15.2-m) length of line. A 16-ounce weight is available at many tackle shops and is heavy enough to descend a majority of Gulf reef fish subject to barotrauma. However, using more weight would help to descend a large fish or where currents are strong. NMFS proposes the 60-ft (18.3-m) minimum length for the line attached to a descending device to ensure fish are released at a minimum depth of 50 ft (15.2 m) while someone using the descending device is standing on the deck of a vessel, and to account for possible ocean currents or swells. Using a line long enough to release a fish at the depth from which it was caught will best ensure that the fish can recover from the effects of barotrauma.

These proposed minimum specifications are currently required for commercial and recreational fishermen in the South Atlantic snapper-grouper fishery. NMFS proposes the same specifications for a descending device in the Gulf reef fish fishery to increase the likelihood of compliance by fishermen who may fish in both the Gulf and South Atlantic, and to aid with enforcement.

As specified in the Descend Act, a descending device may attach to the fish's mouth, through the fish's mouth and gill plate, or it may be a container that will retain the fish while it is lowered to depth. Operating a descending device can vary between types but the device must be capable of releasing the fish at depth automatically, by actions of the device operator, or by allowing the fish to escape on its own when at depth.

Venting Tool

This proposed rule would define a venting tool consistent with the Gulf Council's policy and remove the term "venting device" from the regulations. A venting tool must be capable of penetrating the abdomen of a fish to release the excess gases accumulated in body cavity when a fish is retrieved from depth. Further, a venting tool must be a sharpened, hollow instrument that allows air to escape, such as a hypodermic syringe with the plunger removed. A 16-gauge needle, which has an outside diameter of 0.065 inches (1.65 mm), is the minimum diameter hollow

tube that must be used. Gulf reef fish fishermen may also choose to use a larger diameter hollow needle because it will allow more air to escape from a fish rapidly.

Fishermen must not use a tool that is not hollow, such as a knife or an ice pick, to vent a fish. A knife or other non-hollow tube is not a venting tool and its use would cause further injury to a fish.

While the Descend Act and this proposed rule would allow Gulf reef fish fishermen to choose whether to carry a descending device or venting tool on a vessel, there is nothing that would prevent fishermen from carrying both types of devices. Fishermen may find that they favor a certain device for individual situations.

Expiration of Requirements

The requirement in section 3 of Descend Act expires 5 years after its enactment. Therefore, the provisions contained in this proposed rule would also end after January 13, 2026, unless the Gulf Council or NMFS take further action to retain any of the regulatory provisions.

Classification

NMFS is issuing this proposed rule pursuant to section 305(d) of the Magnuson-Stevens Act. Pursuant to section 305(d), this action is necessary to clarify the statutory definitions in section 3 of the Descend Act, which adds new section 321 to the Magnuson-Stevens Act that affects persons fishing for Gulf reef fish species. The NMFS

Assistant Administrator has determined that this proposed rule is consistent with the Descend Act, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination follows.

A description of this proposed rule, why it is being considered, and the objectives of this proposed rule are contained in the **SUPPLEMENTARY INFORMATION** section of the preamble. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

This proposed rule would apply to all federally permitted commercial vessels and for-hire vessels, as well as private or rental recreational vessels that are fishing for Gulf reef fish in Gulf Federal waters. The RFA does not consider recreational anglers to be small entities, so they are outside the scope of this analysis and only the impacts on commercial and for-hire fishing businesses will be discussed.

As of February 23, 2021, there were 831 valid or renewable limited-access permits for Gulf reef fish. On average from 2015 through 2019, there were 543 federally permitted commercial vessels each year with reported landings of Gulf reef fish. Their average annual vessel-level gross revenue from all species harvested for 2015 through 2019 was approximately \$121,500 (2020 dollars) and Gulf reef fish accounted for approximately 94 percent of this revenue. The maximum annual revenue from all species reported by a single one of the commercial vessels that landed Gulf reef fish from 2015 through 2019 was approximately \$2.4 million (2020 dollars).

On February 23, 2021, there were 1,306 vessels with a valid or renewable charter vessel/headboat permit for Gulf reef fish (including historical captain permits). Although the charter vessel/headboat permit application collects information on the primary method of operation, the permit itself does not identify the permitted vessel as either a charter vessel or a headboat and vessels may operate in both capacities. The average charter vessel is estimated to receive approximately \$91,000 (2020 dollars) in annual revenue; the average headboat is estimated to receive approximately \$275,000 in annual revenue.

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing

(see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide. All of the commercial fishing businesses directly regulated by this proposed rule are believed to be small entities based on the NMFS size standard.

The SBA has established size standards for all major industry sectors in the U.S. including for-hire businesses (NAICS code 487210). A business primarily involved in the for-hire fishing industry is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$8 million for all its affiliated operations worldwide. All of the for-hire fishing businesses directly regulated by this proposed rule are believed to be small entities based on the SBA size criteria.

No other small entities that would be directly affected by this proposed rule have been identified.

This proposed rule would not establish any new reporting or record-keeping requirements. It would, however, reiterate the requirements of the Descend Act and add clarity to the definitions of a descending device or

venting tool. Per the requirements of the Descend Act, for a person on a vessel used to fish for Gulf reef fish in the Gulf Federal waters, a descending device or a venting tool that is rigged and ready for use while fishing is occurring must be on the vessel. This statutory requirement will remain in effect regardless of the outcome of this proposed rule. No special professional skills would be necessary for compliance with this proposed rule.

Data on how many commercial and for-hire vessels currently own a suitable descending device or venting tool are not available. Again, all regulated small entities would need to have or obtain such descending devices or venting tools regardless of the outcome of this proposed rule. The estimated cost per vessel of purchasing a compliant descending device, based on the lowest price retail option for descending devices, plus the cost of a qualifying weight and line, would be approximately \$19 (2020 dollars). The estimated cost to purchase a compliant venting tool would be \$7 (2020 dollars). Either option would represent well less than one percent of average annual per vessel revenue for affected small entities. Because there is no requirement for these tools to be put into use, only for them to be on board and rigged for use while fishing for Gulf reef fish, there are no additional implicit or explicit costs associated with this proposed rule. In summary, this proposed rule would not be expected

to have a significant economic impact on a substantial number of small entities.

The information provided above supports a determination that this proposed rule would not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, this proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 622

Charter vessel, Commercial, Fisheries, Fishing, Gulf of Mexico, Headboat, Recreational, Reef fish.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 4, 2021.

Carrie Robinson,

Acting Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

**PART 622--FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND
SOUTH ATLANTIC**

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

§ 622.2 Definitions and acronyms. [Amended]

2. In § 622.2, remove the definition of *venting device*.

3. In § 622.30, revise the introductory text and add paragraph (c) to read as follows:

§ 622.30 Required fishing gear.

For a person on board a vessel to fish for Gulf reef fish in the Gulf EEZ, the following fishing gear must be on the vessel and such person must use the gear as specified in paragraphs (a) and (b) of this section.

* * * * *

(c) *Gear required by the DESCEND Act of 2020.* For a person on a vessel to fish for Gulf reef fish in the Gulf EEZ, a descending device or a venting tool that is rigged and ready for use while fishing is occurring must be on the vessel. The requirements in this paragraph (c) are effective until January 14, 2026.

(1) *Descending device.* A descending device is an instrument capable of releasing a fish at the depth from which the fish was caught.

(i) The descending device must be a weighted hook, lip clamp, or container that will hold the fish while it is lowered to depth. The device must be capable of releasing the fish automatically, by actions of the operator of the device, or by allowing the fish to escape on its own when at depth.

(ii) The descending device must use a minimum of a 16-ounce (454-gram) weight and a minimum of a 60-ft (15.2-m) length of line.

(2) *Venting tool.* A venting tool is a device capable of penetrating the abdomen of a fish to release the excess gases accumulated in body cavity when a fish is retrieved from depth. A venting tool must be a sharpened, hollow instrument that allows air to escape, such as a hypodermic syringe with the plunger removed. A 16-gauge needle, which has an outside diameter of 0.065 inches (1.65 mm), is the minimum diameter hollow tube that must be used. A larger diameter hollow needle is preferred to allow more air to escape from a fish rapidly. A device that is not hollow, such as a knife or an ice pick, is not a venting tool and will cause additional damage to a fish.